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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 328

GILBERT R. MASON, *et al.*,

Petitioners,

—v.—

CITY OF BILOXI, MISSISSIPPI.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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In the

Supreme Court of the United States

October Term, 1966

No. .....

Gilbert R. Mason, *et al.*,

Petitioners,

—v.—

City of Biloxi, Mississippi.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered in the above-entitled case on March 21, 1966. Rehearing was denied on April 11, 1966.

Opinion Below

The judgment of the Supreme Court of Mississippi is reported at 184 So. 2d 113 and is set forth in the Appendix, *infra*, p. 1a. No opinion accompanied that judgment or the denial of rehearing.

Jurisdiction

The judgment of the Supreme Court of Mississippi was entered on March 21, 1966 (R. 734); rehearing was denied April 11, 1966 (R. 735).

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Question Presented

A beach 24 miles in length has been constructed along the coast of the State of Mississippi with federal, state and local funds, pursuant to governmental programs and policies designed to promote the health and recreation of all citizens; the Supreme Court of Mississippi has declared title to the pumped-up land in the abutting private landowners; the white public is invited to and freely does use the beach, while Negroes are excluded therefrom; this racially exclusionary policy is encouraged, supported and enforced by state and local governments, notwithstanding their contractual obligation to the United States to assure nondiscriminatory public use of the beach; for attempting to enjoy the beach equally with whites, petitioners, Negroes and white civil rights workers, were convicted of trespass. Under these circumstances, do petitioners' convictions offend the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

Constitutional and Statutory Provisions Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following two statutes of the United States:

1) Act of August 13, 1946, Public Law 727, 79th Cong., 2nd Sess., 60 Stat. 1056, Section I, codified with amendments as 33 U. S. C. A. §426e (1965 Supp.):

> That with the purpose of preventing damage to public property and promoting and encouraging the healthful recreation of the people, it is hereby declared to be the policy of the United States to assist in the construction, but not the maintenance, of works for the improvement and protection against erosion by waves and currents of the shores of the United States that are owned by States, municipalities, or other political subdivisions: *Provided,* That the Federal contribution toward the construction of protective works shall not in any case exceed one-third of the total cost: *Provided further,* That where a political subdivision has heretofore erected a seawall to prevent erosion, by waves and currents, to a public highway considered by the Chief of Engineers sufficiently important to justify protection, Federal contribution toward the repairs of such wall and the protection thereof by the building of an artificial beach is authorized at not to exceed one-third of the original cost of such wall, and that investigations and studies hereinafter provided for are hereby authorized for such localities: *Provided further,* That the plan of protection shall have been spe-

cifically adopted and authorized by Congress after investigation and study by the Beach Erosion Board under the provisions of section 2 of the River and Harbor Act approved July 3, 1930, as amended and supplemented.

2) Act of June 30, 1948, Public Law 858, 80th Cong., 2nd Sess., 62 Stat. 1172, Section 101:

Sec. 101. The following works of improvement of rivers and harbors and other waterways for navigation, flood control, and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and supervision of the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated:

. . .

Harrison County, Mississippi; Shore Protection; House Document Numbered 682, Eightieth Congress; . . .

This case also involves the following three statutes of the State of Mississippi:

1) Miss. Code Ann., 1942, Rec., §8516.3, Section 2:

2. The board of supervisors be and the same is hereby given full power and authority to meet and do and grant any request of the United States Beach Erosion Board of the United States Army Engineers by and under public law 727, 79th congress, chapter 960, 2nd session, and to assure either or both the following:

(a) Assure maintenance of the sea wall and drainage facilities, and of the beach by artificial replenishment,

during the useful life of these works, as may be required to serve their intended purpose;

(b) Provide, at the county's own expense, all necessary land, easements and rights-of-way;

(c) To hold and save the United States free from all claims for damages that may arise either before, during or after prosecution of the work;

(d) To prevent, by ordinance, any water pollution that would endanger the health of the bathers;

(e) To assume perpetual ownership of any beach construction and its administration for public use only, and that the board of supervisors is given full power and authority to do any and all things necessary in and about the repair and reconstruction, or construction or maintenance of the sea wall and sloping beach adjacent thereto, and they are given such power to cooperate with the requirements of the United States government to receive any grant or grants of money from congress or to contribute any grant or grants to the United States Army Engineers in and about this construction and maintenance, and they are further given full power and authority to employ engineers, lawyers, or any other professional or technical help in and about the completion of this project. In the event the county engineer is selected to do any or all of said work, the board of supervisors is hereby authorized to pay and allow him such reasonable fees or salary which, in their opinion, is necessary, just and commensurate to the work done by him.

They are further given full power and authority to let, by competitive bids, any contract for the repair

of said wall, or for the installation and drainage, and for the construction of any additional section of wall, together with any artificial beach adjacent to said wall, or they may, in their discretion, negotiate a contract for any and all construction or any part thereof for the construction, repair, reconstruction or additions thereto, or they may do any or all of said work under the direction of the county engineer or engineers employed by them and for which purpose they may employ all necessary labor, equipment and purchase necessary materials.

The intent and purpose of this act is to give unto the respective boards of supervisors the full power and authority to carry out all the provisions herein, and to act independently, jointly or severally with the United States government by and under public law 727, 79th congress (Laws, 1948, ch. 334, §2).

2) Miss. Code Ann., 1942, Rec., §2409.7 (1964 Supp.):

§2409.7. Trespass—going into or upon, or remaining in or upon, buildings, premises or lands of another after being forbidden to do so.

1. If any person or persons shall without authority of law go into or upon or remain in or upon any building, premises or land of another, whether an individual, a corporation, partnership, or association, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing including any sign hereinafter mentioned, by any owner, or lessee, or custodian, or other authorized person, or after having been forbidden to do so by such sign or signs posted on, or in such building, premises or

land, or part, or portion, or area thereof, at a place or places where such sign or signs may be reasonably seen, such person or persons shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars ($500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this act, but such other part shall remain in full force and effect (Laws, 1960, ch. 246, §§1-3).

3) Miss. Code Ann., 1942, Rec., §4065.3:

§4065.3. Compliance with the principles of segregation of the races.

1. That the entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor, the lieutenant governor, the heads of state departments, sheriffs, boards of supervisors, constables, mayors, boards of aldermen and other governing officials of municipalities by whatever name known, chiefs of police, policemen, highway patrolmen, all boards of county superintendents of education, and all other persons falling within the executive branch of said state and local government in the State of Mississippi, whether specifically named herein or

not, as opposed and distinguished from members of the legislature and judicial branches of the government of said state, be and they and each of them, in their official capacity are hereby required, and they and each of them shall give full force and effect in the performance of their official and political duties, to the Resolution of Interposition, Senate Concurrent Resolution No. 125, adopted by the Legislature of the State of Mississippi on the 29th day of February, 1956, which Resolution of Interposition was adopted by virtue of and under authority of the reserved rights of the State of Mississippi, as guaranteed by the Tenth Amendment to the Constitution of the United States; and all of said members of the executive branch be and they are hereby directed to comply fully with the Constitution of the State of Mississippi, the Statutes of the State of Mississippi, and said Resolution of Interposition, and are further directed and required to prohibit, by any lawful, peaceful and constitutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court of May 17, 1954 (347 U. S. 483, 74 S. Ct. 686, 98 L. ed. 873) and of May 31, 1955 (349 U. S. 294, 75 S. Ct. 753, 99 L. ed. 1083), and to prohibit by any lawful, peaceful, and constitutional means, the causing of a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state, by any branch of the federal government, any person employed by the federal government, any commission, board or agency of the federal government, or any subdivision of the federal government, and to prohibit, by any lawful, peaceful and constitu-

tional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state.

2. The prohibitions and mandates of this act are directed to the aforesaid executive branch of the government of the State of Mississippi, all aforesaid subdivisions, boards and all individuals thereof in their official capacity only. Compliance with said prohibitions and mandates of this act by all of aforesaid executive officials shall be and is a full and complete defense to any suit whatsoever in law or equity, or of a civil or criminal nature which may hereafter be brought against the aforesaid executive officers, officials, agents or employees of the executive branch of State Government of Mississippi by any person, real or corporate, the State of Mississippi or any other state or by the federal government of the United States, any commission, agency, subdivision or employee thereof (Laws, 1956, ch. 254, §§1, 2).

Statement

This case presents the issue whether Negroes may be punished by the State of Mississippi for attempting to enjoy equally with whites one of the largest man-made beaches in the world, a gleaming strip of sand, 24 miles in length, along the coast of the State of Mississippi—constructed and maintained with federal, state and local funds, pursuant to federal, state and local programs and policies.[1] The state and local governments derive substantial benefits from the beach, for it serves as a nation-wide attraction for numerous tourists arriving on the major interstate highway which runs parallel to it and separates it from the homes of the residents.[2]

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[1] The evidence of governmental involvement in the beach was not before the jury that convicted petitioners of trespass, because the trial judge excluded it (R. 586, 593). The proffered evidence included a resolution by the Board of Supervisors of Harrison County declaring its intention to borrow one million five hundred thousand dollars for the construction of the beach (Exhibit 1, R. 585-91) and the contract between the United States and the Board of Supervisors of Harrison County, pursuant to which the federal government donated $1,133,000 (R. 595) for construction of the beach and Harrison County pledged to "[a]ssure perpetual public use of the beach and its administration for public use only" (R. 608) (Exhibit 2, R. 594-611).

The extent of governmental involvement in the beach is discussed in detail under "Reason for Granting the Writ."

[2] The report of the Chief of Engineers to the Department of the Army, set forth in the Appendix, pp. 2a-4a, *infra*, pursuant to which the federal money was allocated, stated (3a-4a):

> As indicated, the project would protect U. S. Highway 90, a major public thoroughfare, and the 24 mile beach, generally 300 feet wide above mean sea level, and would afford a large-scale facility for the healthful recreation of the public at large. In my opinion, the direct and indirect benefits justify the indicated Federal contribution (House Document 682, 80th Cong. 2nd Sess., p. 4).

As a tourist attraction, the beach has always been routinely used by the white public (R. 336-37, 387-88, 480-81, 518-19, 537, 702); Negroes have traditionally been rigorously excluded (R. 285-86, 398).[3]

The State of Mississippi has maintained, and continues to maintain, that Negroes may be excluded from the beach—notwithstanding massive governmental involvement in the beach through monies, programs and policies, and notwithstanding the fact that there would be no beach absent this involvement—because the State has never condemned the land and the Supreme Court of Mississippi has declared title to the beach in fee simple in the abutting private landowners. *Harrison County* v. *Guice*, 244 Miss. 95, 140 So. 2d 838 (1962).

The United States has brought suit in the United States District Court for the Southern District of Mississippi, seeking to enforce the obligation assumed by Harrison County (see note 1, *supra*) to take title to the beach and to "[a]ssure perpetual public use of the beach and its administration for public use only" (R. 608) (contract between the United States and Harrison County, entered into January 23, 1951, Exhibit 2, R. 594-611). *United States* v. *Harrison County*, S. D. Miss., No. 2262. Although the case, filed in 1960,[4] has been fully tried, it has not yet been decided by the District Court.

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[3] The trial judge attempted to prevent counsel for appellants from proving that petitioners' arrests were racially motivated ("The integration issue is not involved in this lawsuit," R. 418-20, 516-17). Nonetheless, the record as a whole leaves no room for doubt, see citations in text, *passim*.

[4] Suit was filed following an earlier incident involving expulsion of Negroes from the beach.

Prior to June, 1963, when this case arose, Negroes unsuccessfully[5] tried to use the beach, and in June, 1963, after 3 years of fruitless litigation, they tried again (R. 336, 386, 408, 623-24). For several weeks, officials of the City of Biloxi and Harrison County attempted to dissuade them. Meetings were held between these officials and the leader of the protesters, petitioner Mason; local newspapers and radio kept whites informed about the "invasion"; and police were placed on the alert (R. 297, 302, 305-08, 379-86, 389-92, 414-17, 473, 485-87, 624-31, 704A).

Finally, on Sunday, June 23, 1963, in the early afternoon, the 29 petitioners herein,[6] three of whom are white (R. 515), set foot upon a portion of West Beach in Biloxi (R. 506-07).

An angry crowd of approximately 2,000 whites gathered along the highway (R. 464, 574, 618); approximately 50 police officers arrived on the scene (R. 614);[7] an agent of the putative titleholder of the beach property appeared

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[5] Some Negroes were arrested and others were beaten by whites (R. 704B).

[6] The petitioners are: Gilbert R. Mason, William Adams, Jr., John M. Aregood, Charley Avery, Margaret Beines, James L. Black, Harold Boglin, Myrtle Bridges, Eugene Cannon, Harry E. Cannon, Mattie Cannon, Charles Carvell, Charles R. Davis, Samuel Edwards, Rehofus Esters, Roger Gene Gallagher, Ernest A. Jackson, E. E. Jackson, Cornelius D. Kemp, Robert C. Louis, Phyllis M. Love, Frances A. Magee, Arlena Massey, Barbara Mosley, Gloria S. Powell, Alvin Schneckenberg, George Watters, Marshall White, Estes Woulard.

[7] Eight agents of the Federal Bureau of Investigation were present (R. 498-99). The large contingent of law enforcement officers was, however, unable to prevent petitioners' cars from being burned or overturned (R. 615-17) or to prevent the police van in which petitioners were driven to jail from being tilted by the mob, causing minor injuries to some of the petitioners (R. 633-34, 652). No arrests were made (R. 610-11).

(R. 447)[8] and ordered petitioners to vacate the property (R. 448, 468),[9] which they failed to do (R. 449); the agent executed a charging affidavit (R. 450); and the police arrested petitioners (R. 450). None of the white members of the public enjoying the beach were arrested (R. 480, 524-26).

Petitioners were charged with trespass in violation of Miss. Code Ann., 1942, Rec. §2409.7, set forth, pp. 6-7, *supra*. The criminal affidavits, as amended, charged that petitioners "did wilfully and unlawfully, without authority of law, remain upon land of another, to wit, Mrs. James M. Parker, on West Beach in Biloxi, Mississippi, after having been forbidden orally to do so by the duly authorized agent of said property owner authorized to control said property, in violation of Section 2409.7 of the Mississippi Code of 1942, annotated, made an ordinance of the City of Biloxi and in violation of Ordinance 12-24, Code of Ordinances of the City of Biloxi" (R. 2-146).

June 28, 1963, petitioners were tried in the Police Justice Court in the City of Biloxi, found guilty and sentenced to 30 days imprisonment and $100.00 fine (R. 6-146).[10]

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[8] The City proved private title to the beach property entered upon by petitioners, conformably to *Harrison County* v. *Guice*, *supra* (R. 426E-426H, 452).

[9] Petitioner Gallagher testified he did not hear this warning above the din of the hostile crowd (R. 510-14, 517, 577). Petitioner Mason testified that he heard the warning but was given insufficient time to leave the beach (R. 619, 621-22, 697-99). These petitioners further testified that they did not intend to remain on premises which they were ordered to vacate (R. 521, 680) and that they had in fact left another part of the beach earlier that day when ordered to do so (R. 527, 613).

[10] Some of the sentences of imprisonment were suspended and some of the fines were suspended as to $50.00 thereof.

The cases of an approximately equal number of juveniles who accompanied the adult petitioners were disposed of in juvenile court proceedings.

On November 20-22, 1963, petitioners were tried *de novo* in the County Court of Harrison County, again convicted and sentenced to 30 days imprisonment (suspended upon good behavior) and $100.00 fine (R. 187-190).

Petitioners appealed to the Circuit Court of Harrison County which, on February 22, 1965, affirmed their convictions and upheld their fines, but set aside their sentences of imprisonment (R. 718).

Petitioners thereupon appealed to the Supreme Court of Mississippi, which on March 21, 1966, affirmed without opinion (184 So. 2d 113) (R. 734). A suggestion of error was timely filed and overruled by the Court on April 11, 1966 (R. 735).

How the Federal Questions Were Raised and Decided Below

In the County Court of Harrison County, petitioners moved for a directed verdict on the grounds that their convictions would deprive them of rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and would, in particular, deprive them "of the use of the public beaches of the City of Biloxi, supported by public funds of the City of Biloxi and by federal grant, all in violation of the equal protection clause of the Fourteenth Amendment . . ." (R. 163). Petitioners' motion was overruled by the trial judge (R. 504).

Petitioners' attempt to raise the issue of the public nature of the beach was frustrated by the trial judge's exclusion of evidence showing massive governmental involvement in the beach (see note 1, *supra*) and by the trial

judge's refusal to give petitioners' proposed instructions to the jury concerning this governmental involvement (R. 180-185).

After trial, petitioners filed a motion for a new trial, assigning roughly the same grounds as in the motion for a directed verdict (R. 191-92). This motion was also overruled by the trial judge (R. 193).

In the Circuit Court of Harrison County and again in the Supreme Court of Mississippi petitioners preserved their claims under the Fourteenth Amendment (R. 728-32).

Reason for Granting the Writ

The Decision Below Approves Enforcement of a State-Supported Policy of Racial Discrimination in Facilities Which Are Significantly Impressed With Federal, State and Local Financial Contributions, Programs and Policies and Conflicts With Decisions of This Court.

Petitioners' convictions for trespassing upon a portion of West Beach in Biloxi offend the Equal Protection Clause of the Fourteenth Amendment because the beach is significantly involved with the federal[11] and state governments and the racially exclusionary policy enforced thereon is significantly tied to the State of Mississippi.

It is no answer to say that private choice is involved in the racially exclusionary policy and that title to the prop-

[11] As a technical matter, the Due Process Clause of the Fifth Amendment has also been violated, since petitioners' right to equal enjoyment of facilities in which the federal government is significantly involved has been abridged. See, e.g., *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963), cert. denied, 376 U. S. 938 (1964).

erty apparently resides in private hands. Private conduct abridging individual rights may offend the Equal Protection Clause if "to some significant extent the State in any of its manifestations has been found to have become involved in it" (*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961)).

Numerous decisions have recognized that a privately-owned facility may be public for purposes of the Fourteenth Amendment. *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 929 (4th Cir. 1963), cert. denied, 376 U. S. 938 (1964); *Eaton* v. *Grubbs*, 329 F. 2d 710 (4th Cir. 1964); *Smith* v. *Holiday Inns of America, Inc.*, 336 F. 2d 630 (6th Cir. 1964). "[B]y sifting facts and weighing circumstances", *Burton* v. *Wilmington Parking Authority*, 365 U. S. at 722, it may be concluded "that the public character of [a] park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who . . . has title under state law" (*Evans* v. *Newton*, 382 U. S. 296, 302 (1966)).

The beach involved in this case has become so entwined with governmental programs and policies and taken on such a governmental character as to preclude basing criminal convictions on failure to obey purely racial limitations on its use.

Federal involvement in the beach has been sustained and massive. Public Law 727, set forth, *supra*, pp. 3-4, enacted by Congress in 1946, set forth the basic federal interest in beach construction and restoration as that of "preventing damage to public property and promoting and encouraging the healthful recreation of the people." Pursuant to Public Law 727, studies of various beaches were made by the

Beach Erosion Board and, pursuant to these studies, Congress, on June 30, 1948, enacted Public Law 858, set forth, *supra,* p. 4, authorizing the construction of the Harrison County Beach involved in this case. This legislation expressly incorporated by reference the report of the Chief of Engineers, United States Army, in House Document No. 682, 80th Cong., 2nd Sess., set forth, Appendix, pp. 2a-4a, *infra,* prescribing the conditions under which the beach work was to be prosecuted. The two conditions of critical importance here were that "the State of Mississippi or local governmental agency . . . provide all necessary lands, easements, and rights-of-way for accomplishment of the work . . . and . . . give satisfactory assurances that they will . . . [a]ssure perpetual public ownership of the beach and its administration for public use only" (House Document No. 682, p. 4) (4a).

Pursuant to this legislation, on January 23, 1951, the United States and Harrison County entered into an agreement for the prosecution of the shore protection work. Conformably to the conditions in the enabling legislation, Harrison County pledged to "[p]rovide at its own expense all necessary lands, easements and rights-of-way" (R. 597) and to "[a]ssure perpetual public use of the beach and its administration for public use only" (R. 608).[12]

The federal government paid $1,133,000 for the repair of the seawall and the construction of the Harrison County Beach.[13]

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[12] Six years ago suit was brought by the United States to specifically enforce these provisions. See text at note 4, *supra.*

The contract regulated in detail the prosecution of the work, including, e.g., insurance (R. 598), inspection (R. 598), labor (R. 601) and materials (R. 607).

[13] This evidence of federal participation was not before the jury which convicted petitioners, because the trial judge excluded all attempts to show the public nature of the beach (R. 586, 593).

State and local governments have also been deeply involved in the beach. On March 31, 1948, the Mississippi Legislature enacted Chapter 334, now codified as Miss. Code Ann., 1942, Rec. §8516.3, §2 of which is set forth, *supra,* pp. 4-6, enabling the Board of Supervisors of Harrison County to meet the federal conditions, i.e., to "[p]rovide, at the county's own expense, all necessary land, easements and rights-of-way" and "[t]o assume perpetual ownership of any beach construction and its administration for public use only." In §1 of Chapter 334, the Mississippi Legislature authorized Harrison County to borrow funds for the beach work in an amount up to $1,500,000. Pursuant to this enabling legislation, in October, 1948, the Board of Supervisors of Harrison County declared its intention to issue bonds in the amount of $1,500,000 (R. 587-91). Subsequently this money was raised and the work prosecuted to completion.[14]

Today, conformably to its contractual obligation with the federal government (R. 609), Harrison County maintains the beach in a condition worthy of a national tourist attraction (R. 623).

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[14] As with the evidence of federal involvement, this evidence of state involvement was not before the jury which convicted petitioners (R. 586). However, the fact that this work was in fact completed is documented in the preamble to Chapter 214 of Mississippi Laws 1952, codified as Miss. Code Ann., 1942, Rec. §8516.4, authorizing Harrison County to raise additional funds "to finish the improvements and work regarding seawall, hydraulic fill, drainage and road beds over the entire length of the county," and reciting that Harrison County had completed "extensive repair to its seawall and extensive work in extending and installing an adequate drainage system behind said seawall, and extensive dredging and placing hydraulic fill in front of said seawall in order that same might be adequately protected."

In addition to receiving public subvention, the beach also serves a public function. Equally applicable to it is the conclusion reached by this Court as to the park in *Evans* v. *Newton*, 382 U. S. at 301: "The service rendered . . . is municipal in nature. It is open to every white person, there being no selective element other than race." Numerous decisions of this Court have recognized that "[m]ass recreation through the use of parks is plainly in the public domain" (*Evans* v. *Newton*, 382 U. S. at 302). *City of New Orleans* v. *Barthe*, 376 U. S. 189 (1964); *Watson* v. *Memphis*, 373 U. S. 526 (1963); *Wright* v. *Georgia*, 373 U. S. 284 (1963); *New Orleans Park Association* v. *Detiege*, 358 U. S. 54 (1958); *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877 (1955); *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955).

Furthermore, consistent with *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); and *Barrows* v. *Jackson*, 346 U. S. 249 (1953), "state courts that aid private parties to perform [a] public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment" (*Evans* v. *Newton*, 382 U. S. at 302). "[T]o the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment" (*Griffin* v. *Maryland*, 378 U. S. 130, 136 (1964)).

But the elements of state action in this case do not stop here. The state and local governments are involved in protecting the beach from Negroes as well as in protecting it from tides and litter. Although it is a matter of national notice that the State of Mississippi and Harrison County entice a brisk tourist traffic to the beach, it is also a mat-

ter of public record that they consider the beach off-limits to Negroes and discourage as emphatically as they know how its use by Negroes. This policy of the State of Mississippi is reflected in Miss. Code Ann., Rec. 1942, §4065.3, set forth, *supra*, pp. 7-9, which requires county and city officials "to prohibit by any lawful, peaceful and constitutional means, the causing of a mixing or integration of the white and Negro races in . . . public places of amusement, recreation or assembly in this state." This legislative exhortation has been well heeded by local officials, including the Mayor, District Attorney and Chief of Police, who have used all the powers of persuasion at their command (R. 641-42, 644-47, 656-59, 692-93) and, when persuasion failed, the arrest and prosecution of petitioners, to discourage Negroes from using the beach. Their purpose in this matter has been largely accomplished, for the arrests and prosecutions of petitioners have largely served to deter further attempts in the past three years to challenge the racially exclusionary policy.

Thus, §4065.3 "depart[s] from a policy of strict neutrality in matters of private discrimination by enlisting the State's assistance only in aid of racial discrimination and . . . involve[s] the State in the private choice as to convert the infected private discrimination into state action, subject to the Fourteenth Amendment. Cf. *Robinson* v. *Florida*, 378 U. S. 153; *Lombard* v. *Louisiana*, 373 U. S. 267; *Peterson* v. *City of Greenville*, 373 U. S. 244" (*Evans* v. *Newton*, 382 U. S. 296, 306 (1966) (White, *J.* concurring)).

Harrison County and the City of Biloxi may hardly maintain that they have acted in a neutral fashion in enforcing the exclusion of Negroes from the beach. Obligated by

contract with the United States to assure nondiscriminatory public use of the beach and commanded by the State of Mississippi to enforce racial discrimination wherever possible, they have disregarded the paramount federal obligation and heeded instead the state legislative command. By subordinating the national interest in nondiscrimination to the state interest in discrimination, they have struck a balance inconsistent with the Constitution of the United States.

A final word should be said about the record made below. Because the trial judge excluded much evidence tending to show the public nature of the beach (see notes 12 and 13, *supra*), reversal for a new trial would plainly be required under *Carter* v. *Texas,* 177 U. S. 442, 448-49 (1900); and *Coleman* v. *Alabama,* 377 U. S. 129 (1964) if the record of governmental involvement were thought to be insufficient.[15] However, because the refused exhibits are before the Court and because much of the federal and state involvement is a matter of public record, petitioners submit that outright reversal is warranted.

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[15] The trial judge also prevented counsel for petitioners from making certain offers of proof (R. 535-36; 637-38).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Judgment of Supreme Court of Mississippi

Monday, March 21, 1966, Court Sitting

No. 43,705

GILBERT MASON, *et al.*

VS.

CITY OF BILOXI.

This cause having been submitted at a former day of this Term on the Record herein from the Circuit Court Harrison County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 22nd day of February 1965 be and the same is hereby affirmed. It is further ordered and adjudged that the City of Biloxi do have and recover of and from the appellants and Rev. Robert Nance and J. O. Tate D.D.S., sureties on the appeal bond herein, all of the costs of this appeal to be taxed, for which let proper process issue.

Minute Book "BN" Page 528

House Document No. 682, 80th Cong., 2nd Sess.

REPORT OF THE CHIEF OF ENGINEERS, UNITED STATES ARMY

DEPARTMENT OF THE ARMY,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, March 8, 1948.

Subject: Beach erosion control study of Harrison County, Miss.

To: The Secretary of the Army.

1. I submit for transmission to Congress a report with accompanying papers on a beach erosion control study of Harrison County, Miss., made by the Corps of Engineers in cooperation with the Board of Supervisors of Harrison County under the provisions of Section 2 of the River and Harbor Act approved July 3, 1930, as amended and supplemented.

2. After full consideration of the reports secured from the district and division engineers, the Beach Erosion Board recommends that a project be adopted by the United States authorizing Federal participation in the amount of $1,133,000 toward the repair of the Harrison County sea wall and its protection by the construction of a beach from Biloxi Lighthouse to Henderson Point near Pass Christian, Miss., with attendant drainage facilities, subject to certain conditions.

3. The proposed 24-mile beach between Biloxi and Pass Christian (Henderson Point) would protect the existing sea wall built at a reported first cost of $3,400,000 during

House Document No. 682, 80th Cong., 2nd Sess.

1925-28 by Harrison County. After the wall was constructed natural forces including hurricanes eroded the original protective beach and severely damaged the structure which is now subject to direct wave action including undermining at normal stages of tide. The wall, extending essentially throughout this 24-mile section, and the foreshore are publicly owned. That wall protects U. S. Highway 90, located generally about 100 feet landward of the wall. This road is the principal highway along the Gulf coast between Florida and Louisiana and the most heavily traveled road in Mississippi. In view thereof it is my opinion that the importance of this highway warrants application of Federal aid pursuant to the policy enunciated in Public Law 727, Seventy-ninth Congress, approved August 13, 1946, section I of which provides:

* * * * *

4. Under the Federal-aid project proposed by the Beach Erosion Board the United States would finance the proposed beach improvement at an estimated cost of $856,000 and participate in the financing of needed repairs to the sea wall at an estimated cost of $277,000, a limiting total of $1,133,000 which is one-third of the original construction cost of the sea wall. Local interests would, among other things, effect remaining necessary sea-wall repairs, alter the drainage system, maintain the new beach and attendant facilities, remedy water pollution that would endanger the public health, and administer the beach for public use only. The cost to local interests includes an estimated $1,182,000 for drainage system alterations and an undetermined amount for sea-wall repairs. As indicated, the project would protect U. S. Highway 90, a major public thoroughfare, and the 24-mile beach, generally 300 feet wide above mean sea level, and would afford a large-

scale facility for the healthful recreation of the public at large. In my opinion the direct and indirect benefits justify the indicated Federal contribution.

5. Accordingly, after due consideration of these reports, I concur generally in the views and recommendations of the Board. I recommend adoption of a project by the United States authorizing Federal participation of $1,133,000 toward the repair of the Harrison County sea wall and its protection by the construction of a beach from Biloxi Lighthouse to Henderson Point near Pass Christian, Miss., in substantial accordance with the plans outlined by the Beach Erosion Board, provided the State of Mississippi or local governmental agency: (1) adopt the aforementioned plan of improvement including repairs and alterations; (2) submit for approval by the Chief of Engineers detailed plans and specifications and arrangements for prosecuting the entire improvement prior to the commencement of such work; (3) provide all necessary lands, easements, and rights-of-way for accomplishment of the work; and provided further that responsible State or local interests give satisfactory assurances that they will: (a) maintain the sea wall and drainage facilities, and the beach by artificial replenishment, during the useful life of these works as may be required to serve their intended purpose; (b) hold and save the United States free from all claims for damages that may arise either before, during, or after prosecution of work; (c) remedy water pollution that would endanger public health; and (d) assure perpetual public ownership of the beach and its administration for public use only.

R. A. Wheeler,
Lieutenant General,
Chief of Engineers.

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No. 328

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

GILBERT R. MASON, et al ..... Petitioners

vs.

CITY OF BILOXI, MISSISSIPPI ..... Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

No opinion was rendered by the Supreme Court of the State of Mississippi, but it's judgment is reported in 184 So. 2d at Page 113. The judgment being as follows:

JUDGMENT OF SUPREME COURT OF MISSISSIPPI

Monday, March 21, 1966, Court Sitting

No. 43,705

This cause having been submitted at a former day of this Term on the Record herein from the Circuit Court Harrison County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 22nd day of February 1965

be and the same is hereby affirmed. It is further ordered and adjudged that the City of Biloxi do have and recover of and from the appellants and Rev. Robert Nance and J. O. Tate D.D.S., sureties on the appeal bond herein, all of the costs of this appeal to be taxed, for which let proper process issue.

Minute Book "BN" Page 528.

JURISDICTION

The question of private ownership and the right of the general public to use the beach area upon which the Petitioners were arrested is presently under consideration upon fully developed facts in the case now pending in the United States District Court for the Southern District of Mississippi, Southern Division, styled United States vs. Harrison County, Mississippi, et al, Cause No. 2262. This case filed by the United States in 1960 has been tried at great length and expense with the United States, Harrison County, the City of Biloxi, and all individual landowners along the entire beach area involved as parties to this suit; the cause has been fully tried and submitted on briefs and oral arguments and Judge William Harold Cox is now in the process of preparing findings of fact and conclusions of law and his decision is expected at an early date. It is therefore believed that said cause will be fully determinative on the issues involved in this case relating to the question of ownership of the land involved and it is therefore submitted that the question of certiorari in the present case should be abated until such time as a ruling is made in the other pending cause where the questions of title, ownership and right of use are squarely presented under fully developed and complete facts with all necessary parties before the court.

QUESTIONS PRESENTED

The Petitioners were convicted of trespass on private property in the City of Biloxi, Harrison County, Mississippi. The property where the trespass took place was erected in connection with the erection of a sloping beach protection device in the year 1951, pursuant to governmental programs and policies to which the private adjacent upland owners were not parties; the Supreme Court of the State of Mississippi has held that this strip of land (sand beach) is an artificial addition to adjacent upland and where the owner of the upland had no part in creating the artificial addition or incretion, such owner acquired a title in fee to such additional land; the landowner of the land here involved has never parted with such title by condemnation or otherwise and it remains private property.

The question therefore is not whether the petitioners' convictions offend the equal protection clause of the 14th Amendment to the Constitution of the United States, but is whether or not the fee simple property owner may enforce the state trespass laws with respect to his private property.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the following pertinent section of the *Fifth Amendment to the Constitution of the United States*:

> ". . . nor shall private property be taken for public use, without just compensation."

This case also involves the following provision of the *Mississippi Constitution, Article III, Section* 17, which provides:

"Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public."

This case also involves the following Statute of the State of Mississippi:

Miss. Code Ann., 1942, Rec., Sec. 2409.7 (1964 Supp.):

Sec. 2409.7. Trespass—going into or upon, or remaining in or upon buildings, premises or lands of another after being forbidden to do so.

1. If any person or persons shall without authority of law go into or upon or remain in or upon any building, premises or land of another, whether an individual, a corporation, partnership, or association, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing including any sign hereinafter mentioned, by any owner, or lessee, or custodian, or other authorized person, or after having been forbidden to do so by such sign or signs posted on, or in such building, premises or land, or part, or portion, or area thereof, at a place or places where such sign or signs may be reasonably seen, such person or persons shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars ($500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this act, but such other part shall remain in full force and effect (Laws, 1960, ch. 246, Secs. 1-3).

STATEMENT

On June 23, 1963, Petitioners, with others, went on the sand beach located on the southern portion of property of Pattie R. (Mrs. James M.) Smith Parker, in the City of Biloxi, Harrison County, Mississippi. Petitioners swam, played ball and otherwise enjoyed themselves on said property for approximately 45 minutes (R-466, R-591) without incident or interference from police officers or other persons present (R-467). After said period of time, Petitioners were notified by the landowner's representative to leave the property. After three such requests, Petitioners failed to leave whereupon they were placed under arrest for trespass.

The amended criminal affidavits charged that the Petitioners "did wilfully and unlawfully, without authority of law, remain upon land of another, to-wit Mrs. James M. Parker, on West Beach in Biloxi, Mississippi, after having been forbidden orally to do so by the duly authorized agent of said property owner authorized to control said property in violation of Section 2409.7 of the *Mississippi Code of* 1942, annotated, made an ordinance of the City of Biloxi, and in violation of Ordinance 12-24 Code of *Ordinances of the City of Biloxi.*"

On June 28, 1963, Petitioners were tried and found guilty of trespass by the Police Justice of the City of

Biloxi, Mississippi. Petitioners thereafter appealed their convictions to the County Court of Harrison County, Mississippi, and on trial de novo by jury, they were again found guilty and sentenced to thirty (30) days imprisonment in the County jail and fined $100.00 each. Petitioners thereafter prosecuted an appeal to the Circuit Court of Harrison County, Mississippi, which affirmed the judgment of the lower Court in all respects except as to imprisonment in the County jail. Thereafter on March 2, 1965, the Circuit Judge entered an order allowing an appeal to the Supreme Court of the State of Mississippi, which on March 21, 1966 affirmed the lower court Per Curiam (184 So. 2d 113). A suggestion of error was filed and overruled by the State Supreme Court on April 11, 1966.

ARGUMENT

This case presents the issue of the right of a private citizen to invoke the criminal trespass statutes of the State of Mississippi with respect to his private property.

It is undisputed that the Petitioners were on the lands of another, namely, Pattie R. (Mrs. James M.) Smith Parker, and that they remained thereon after having orally been forbidden to do so by the representative of the landowner, thus meeting each element of the Mississippi Statute on Trespass, Section 2409.7 of the *Mississippi Code of* 1942, *Recompiled.*

The principal question therefore is whether or not the land involved is private property or because of governmental involvement, to which the private land owner was not a party, loses its character as private property.

By Chapter 319 laws of 1924, Harrison County, Mississippi was authorized to and did construct a seawall

across the southern part of the county including the Parker property acquiring an easement giving it the right to construct and maintain the seawall and ingress and egress over the Parker land south of U. S. Highway 90. Thereafter, due to the construction of the seawall and wave action, that part of the beach lying south of the seawall eroded away.

Sometime later the said Harrison County undertook to borrow funds from the Federal government pursuant to applicable state and Federal statutes and later pumped up sand from the bottom of the Mississippi Sound, which pumped up land covered a part of the Parker land as well as an area that was formerly covered by water. No additional easement was acquired either prior to or subsequent to pumping in the land.

The land here involved was and is similarly situated to the land involved in the case of *Harrison County vs. Guice*[1] decided by the Mississippi Supreme Court in 1962.

It is submitted that there has been no condemnation of the property and regardless of governmental involve-

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[1] The question of ownership of the land in question was settled in the case of *Harrison County vs. Guice*, 140 Southern 2nd, Page 838 (Mississippi 1962) wherein it was held:

"The strip of land involved in the case at bar which was 'pumped up' in connection with the erection of the sloping beach protection device in 1951 is an artificial addition to the Guice uplands erected by strangers to the upland title. We have held either directly or by necessary inference that the owner of uplands bordering tidewater may not extend his land by artificially reclaiming the state-owned bottoms. *Giles v. City of Biloxi*, 237 Miss. 65. This Court has not had occasion to pass upon the question under discussion. We hold that where the owner of uplands has no part in creating the artificial addition or incretion, such owner acquires a title in fee to such additional land. Reason and authority recommend this rule.

. . . If the State, acting through the county, could 'pump up' the submerged bottoms adjacent to privately-owned lands, and thereby cut off direct access to the water, it could effectively destroy the value of much residential property as well as commercial and industrial waterfront property. Such taking of private property could not be accomplished without first paying just compensation. *Mississippi Constitution Section* 17.

ment in the land, it is and remains, private property until such time as it is taken for public use under the *Fifth Amendment to the Constitution of the United States* or the appropriate constitutional provisions of the *Constitution of the State of Mississippi, Section* 17.

It is further submitted that the entire question of the ownership of the property and obligations, if any, of Harrison County are properly before the United States District Court for the Southern District of Mississippi in a suit brought by the United States seeking enforcement of the obligations alleged to be on Harrison County, Mississippi, with respect to the sand beach. This case, *United States vs. Harrison County,* S.D. Miss. No. 2262, has been fully tried with all necessary and proper parties properly before the Court and would govern and be controlling as to the private versus public aspects of this beach property. This case is presently awaiting decision of Judge William Harold Cox, who is now preparing findings of fact and conclusions of law with respect thereto.

The Petitioners made no showing by offer of proof or otherwise that the private landowner, (Mrs. James M. Parker) was a party to the governmental programs or policies with regard to her private property and it is submitted that she is a necessary party to any declaration of taking of her said property.

There is no question that there was a wilful trespass upon the Parker property in the City of Biloxi, and that all elements of the offense have been established and the petitioner's convictions allowed to stand.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Attorneys for Petitioner

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CERTIFICATE OF SERVICE

I, ALBERT SIDNEY JOHNSTON, JR., one of the attorneys for the Respondent, City of Biloxi, Mississippi, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the.....day of November, 1966, I served copies of the attached reply brief of respondent on the petitioner as follows:

1. On Jack Greenberg, James M. Nabritt, III and Melvin Zarr, by mailing a copy in a duly addressed envelope with postage prepaid to their office at 10 Columbus Circle, New York, New York 10019 and to R. Jess Brown, by mailing a copy in a duly addressed envelope with postage prepaid to his office at 125½ North Farish Street, Jackson, Mississippi 39201.

ALBERT SIDNEY JOHNSTON, JR.
Attorney for Respondent
Schwan Building
Biloxi, Mississippi